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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-893

A/S D/S SVENDBORG & D/S AF 1912 A/S,

Petitioners,

against

MARINE ENGINE SPECIALTIES, CORP.,

Respondent.

PETITIONERS' BRIEF IN REPLY

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Statement

Petitioners believe it appropriate to file this short brief in reply to refocus the facts and issues which have been somewhat blurred by the brief in opposition.

The Facts

Not satisfied with relitigating the facts in the Court of Appeals, respondent seeks to do so as well in this Court.

1. Respondent challenges (p. 9) the District Court's designation of decedent as a "repairer of ship's pumps" as a "rationalization without any foundation in proof". Yet, this is exactly how Edwin Burke, President of respondent described his function aboard the vessel (Pl. Ex. 11,

p. 12).* The Court of Appeals described him a little more elegantly as a (p. 2A) "service engineer for pumps manufactured by Pacific".

2. Respondent lays considerable stress on the wind and sea conditions although conceding that the ship created a lee to minimize their affect. So carried away does respondent become in attempting to show an unusual boarding situation, that it is moved to claim that petitioners forced decedent "to board in the middle of what was tantamount to a storm * * *". (p. 7) Here again, respondent overlooks the fact that the most difficult part of this or any boarding operation, the transition from the launch to the pilot ladder, was in the language of the District Court (p. 19A) "effected without incident".

There is not a shred of evidence that decedent was washed, knocked or blown off the pilot ladder.** "Gripping the rope sides of the ladder", he had, according to the District Court, "climbed between one and three steps upward" "Suddenly Nye stopped and called 'help me, help me' " and then fell into the water. The Court of Appeals noted as well (4A) that after decedent proceeded 1 or 2 steps on the pilot ladder "he stood still and called for help". Shortly thereafter, he "let go of the pilot ladder and had fallen into the sea". It seems manifest that no external force drove decedent off the pilot ladder, he was simply unable to climb or even hold on, and was in obvious distress.

3. Respondent notes that the autopsy attributed the cause of death to drowning (p. 5) and then goes on from

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* "The EVELYN MAERSK was bound, I believe, for the Persian Gulf, and would pick Mr. Nye up at the Canary Islands and he would ride down to Cape Town, South Africa, and in the course of the transit between Las Palmas in the Canary Islands and Cape Town, repair both units."

** The vessel was not rolling. (Capt. Jensen dep. p. 36).

"Q. Was the ship, that is your ship, rocking and rolling in the waves?

A. No."

this to state that there was no proof that any of his physical conditions were proximately related to the occurrence. The fact is that the autopsy, performed in the Canary Islands, was deficient. Dr. Helpern examined the autopsy report and found that the internal organs were (540a) "rather inadequately described with regard to determining what diseases may have been present". Dr. Bloomfield said (493a) "Unfortunately, this autopsy report is grossly inadequate to make a diagnosis of anything."

It goes without saying that drowning did not cause decedent to fall off the ladder.

4. Respondent also proposes (p. 4) to relitigate here the rescue efforts which both the District Court (26A-27A) and the Court of Appeals (8A-9A) upheld.

5. Respondent claims (p. 4-5) that decedent could be expected to "have had no such training" for boarding the pilot ladder here. Again, respondent is answered by its own President who said he had done so "many times" (Burke, Pl. Ex. 11, p. 17).

I

The District Court finding that respondent was negligent in ordering a man in decedent's physical condition "to hazard a journey which could involve climbing onto a vessel at sea" is supported by substantial evidence as fully described in the Petition (p. 7-8). The most reasonable explanation why decedent suddenly was unable to climb or even hold onto the pilot ladder can be found in one or more of his many disabilities or infirmities. At the least the finding of fact as to this was not clearly erroneous.

Certainly, it is possible that the District Court could have ruled in favor of respondent on this issue just as it is possible that the same Court could have decided that there was no liability on petitioners' part in the first place. The point is that it did not do so, and unless the Court of Appeals is to serve as a retrier of the facts, for which it has been criticized by respected authority (Petition p. 9-14), respondent has already had its full day in court under our system of justice. Petitioner should not be deemed unduly presumptuous for maintaining that in nine of the other Courts of Appeals, this Petition would not have been necessary.

II

Respondent argues in Points II and III that where no warranty of seaworthiness is owed by the shipowner, it logically follows that no warranty of workmanlike service is owed by the injured or deceased worker's employer. While petitioners contest the validity of such a proposition, they do not have to meet it here since the District Court found that decedent *was* entitled to the warranty of seaworthiness at (22A-23A) and the Court of Appeals bypassed this finding without reversing it (6A).

It is at this point that respondent's anxiety over having decedent designated a "repairer of ship pumps" becomes transparent. It is the underpinning for the arguments in respondent's II and III that the warranty of workmanlike service is inapplicable. Respondent patently fears a confrontation with *Booth Steamship Co., Ltd.* v. *Meier and Oelhaf Co.*, 262 F.2d 310, 312-313 (2d Cir. 1958) which was

followed by this Court in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 318, 323 (1964).

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February 20, 1975

Respectfully submitted,

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